

Remarks

The drawings, specification, and claims were amended in accordance with the amendments above. The amendments to the claims are being made merely to clarify the invention. All of the amendments are fully supported by the specification, claims, and figures as originally filed. No new matter is believed or intended to be involved.

§103 Rejections

Claims 1-3, 7, 11, and 13-22 were rejected under 35 U.S.C. §103(a) as being obvious over Finkenzeller et al. (U.S. 5,954,667) in view of John et al. (2001) (U.S. 2001/0049480) in view of Levendowski et al. (U.S. 2002/0029005). Claims 23-25 and 27-28 were rejected under 35 U.S.C. §103(a) as being obvious over Finkenzeller et al. in view of John et al. (2001), and further in view of John (2005) (U.S. 2005/0018858) and Clauson et al. (U.S. 5,423,327). Claims 4-6, 8-10, and 30-32 were rejected under 35 U.S.C. §103(a) as being obvious over Finkenzeller et al. in view of John et al. (2001); or Finkenzeller et al. in view of John et al. (2001), John (2005), Clauson et al., and further in view of Lencioni, Jr. (U.S. 4,219,028). Claims 12 and 29 were rejected under 35 U.S.C. §103(a) as being obvious over Finkenzeller et al. in view of John et al. (2001) and Levendowski et al.; or Finkenzeller et al. in view of John et al. (2001), John (2005), Clauson et al., and further in view of Zoth et al. (U.S. 6,786,873). Claim 33 was rejected under 35 U.S.C. §103(a) as being obvious over Finkenzeller et al. in view of John et al. (2001) in further view of John et al. (2005) and in further view of Seeley et al. (U.S. 4,132,226). Under MPEP 2143.03, in order to establish a *prima facie* case of obviousness, the Office must give due consideration to all of the limitations of a claim. Obviousness rejections “cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *KSR International Co. v. Teleflex Inc.*, 82 USPQ2d 1385, 1395-97 (2007) (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)). For at least the reasons set forth below, Applicant respectfully submits that the combined art of record fails to render any of the present claims obvious.

Applicant submits that the art of record fails to teach or suggest all of the limitations recited in each independent claim in accordance with MPEP 2143.03. For instance, Applicant notes that amended independent claim 1 recites “a control module operable to house an auditory

evoked response (AER) data processor...wherein the AER data processor is integrally formed with the frame such that the frame and the AER data processor are mechanically coupled, wherein the control module and the frame together are operable to provide reference points for making the screening device positionable upon a subject in relation to a facial feature of the subject.” These limitations, among others recited in amended claim 1, are neither taught nor suggested by the combined art of record. Applicant therefore submits that the combined art of record fails to teach or suggest all of the limitations of amended claim 1 in accordance with MPEP 2143.03.

As can be seen, for example, in FIG. 1 of Applicant’s disclosure, the AER data processor is part of control module (12), which is integrated with headset (10). In contrast, Finkenzeller, et al., John et al. (2001), and Levendowski et al. do not show any AER data processor as being integrated with a headset. For example, FIG. 2 of Finkenzeller et al. and FIG. 1A of John et al. (2001) show headset being separate any sort of processor. At best, any sort of apparatus for mounting to the head of a subject in both Finkenzeller et al. and John et al. is shown only tethered by wire to any sort of processor, which cannot be reasonably construed as being “integrally formed” as recited in amended independent claim 1. Levendowski et al. appears to be silent regarding the location of any processor. Furthermore, the prior art of record does not appear to show that a frame and a control module may be used as a reference guide for positioning the headset on a subject in relation to a facial feature of the subject. In contrast, in Applicant’s disclosure shows in FIG. 1 and paragraph [0072] that the frame and control module are operable to facilitate positioning of the headset on a subject. In particular, the frame is operable to provide a visual reference point for the vertical positioning of the headset upon the subject, whereas the control module is operable to provide a visual reference point for the rotational positioning of the headset upon the subject. Accordingly, Applicant respectfully submits that the combined art of record fails to render present claim 1 obvious in accordance with MPEP 2143, and respectfully requests that the rejection be withdrawn.

Amended independent claim 23 recites “sampling the low frequency signal electrode at first sampling rate and sampling the high frequency signal electrode at a higher second sampling rate.” These limitations, among others recited in amended claim 23, are neither taught nor suggested by the combined art of record. Applicant therefore submits that the combined art of

record fails to teach or suggest all of the limitations of amended claim 23 in accordance with MPEP 2143.03.

In the Office Action dated July 11, 2011, the Office states that “it is obvious that the electrodes can be sampled at any desired frequency such as sampling the first electrode at a low frequency sampling rate and sampling the second signal electrode at a high frequency.” Applicant respectfully disagrees that doing so would be obvious. As stated in Applicant’s specification in paragraph [0048], “The gain, filters, and A/D conversion settings may thus be different to accommodate the differences in signal characteristics” with respect to sampling at high and low frequencies. As a result, Applicant submits that a general electrode cannot simply be used to sample at different frequencies without considering the gain, filters, and A/D conversion as taught in Applicant’s specification. Furthermore, if the Office was attempting to take Official Notice of any facts to establish obviousness, then the Office has fallen far short of the burden set forth in MPEP 2144.03. Accordingly, Applicant respectfully submits that the combined art of record fails to render present claim 23 obvious in accordance with MPEP 2143, and respectfully requests that the rejection be withdrawn.

Amended independent claim 33 recites “wherein the act of recording AER data is performed during the act of characterizing the AER data with the data analyzer.” These limitations, among others recited in amended claim 33, are neither taught nor suggested by the combined art of record. Applicant therefore submits that the combined art of record fails to teach or suggest all of the limitations of amended claim 33 in accordance with MPEP 2143.03.

In rejecting claim 33, the Office cited Seeley et al. for the proposition of monitoring artifacts. However, Applicant submits that Seeley et al. fails to make up for the deficiencies of the prior art. In particular, Seeley et al. does not teach or suggest that the monitoring for artifacts occurs during the recording and characterizing of AER data, as recited in claim 33. As seen in FIG. 2 of Seeley et al., any sort of recording (labeled as “data in”) occurs separately in time from any sort of analysis, as seen in box (29). Accordingly, Applicant respectfully submits that the combined art of record fails to render present claim 33 obvious in accordance with MPEP 2143, and respectfully requests that the rejection be withdrawn.

Applicant further notes that the dependent claims include additional limitations not taught or suggested in the art of record, thus forming independent basis for non-obviousness.

Conclusion

While several distinctions have been noted over the art of record, Applicant notes that there are several other limitations recited in the present claims which are neither taught nor suggested by the art of record. Applicant expressly reserves all rights and arguments with respect to distinctions not explicitly noted herein. In addition, to the extent that the amendments constitute a narrowing of the claims, such narrowing of the claims should not be construed as an admission as to the merits of the prior rejections. Indeed, Applicant traverses the rejections and preserves all rights and arguments. To the extent that any particular statement or argument by the Office in the pending Office Action has not been explicitly addressed herein, the same should not be construed as an acquiescence or admission by the Applicant that such statements or arguments by the Office are accurate or proper.

Based on the foregoing, all pending claims are in a condition for allowance. Accordingly, Applicant respectfully requests reconsideration and an early notice of allowance. Should the Office wish to discuss the amendments or arguments made herein, Applicant invites the Office to contact the undersigned at (513) 651-6175 or via e-mail at [dchoi@fbtlaw.com](mailto:dchoi@fbtlaw.com).

The Commissioner for Patents is hereby authorized to charge any deficiency, including any fees required for an extension of time not already paid for or any other required fees not already paid for, or to credit any overpayment of fees, to Frost Brown Todd LLC Deposit Account No. 06-2226.

Respectfully Submitted,



Daniel Choi (Reg. No. 66,714)  
FROST BROWN TODD LLC  
3300 Great American Tower  
301 East Fourth Street  
Cincinnati, Ohio 45202  
(513) 651-6175  
[dchoi@fbtlaw.com](mailto:dchoi@fbtlaw.com)